



FILED
Oct 31 2008, 9:53 am
Beverly Smith
CLERK
of the supreme court,
court of appeals and
tax court

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**IN THE
COURT OF APPEALS OF INDIANA**

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No. 32A05-0802-CV-43

APPEAL FROM THE HENDRICKS SUPERIOR COURT
The Honorable Karen M. Love, Judge
Cause No. 32D03-0410-DR-150

October 31, 2008

MEMORANDUM DECISION – NOT FOR PUBLICATION

MATHIAS, Judge

Alicia Kay Dotson (“Wife”) appeals the order of the Hendricks Superior Court regarding distribution of marital assets and college expenses. Wife raises the following issues:

- I. Whether the trial court abused its discretion when it awarded the marital residence and the GMC Yukon to Husband;
- II. Whether the trial court sufficiently determined the character and nature of Husband’s provisional order payment to Wife;
- III. Whether the trial court sufficiently determined the character and nature of the \$20,000 attributed to Wife due to gift or inheritance; and,
- IV. Whether the trial court erred in determining that Husband’s relationship with Son was sufficiently repudiated such that Husband would no longer be obligated to assist Son with college expenses.

We affirm in part, reverse in part, and remand with instructions.

Facts and Procedural History

Wife and Husband were married on January 12, 1985. There is one child of the marriage born in 1985. At the time of filing he was a student at Marian College, attending on a tennis scholarship and living at the marital residence.

On October 22, 2004, Wife filed a Petition for Legal Separation and Motion for Provisional Orders. The trial court entered a provisional order on March 4, 2005, that provided, in part, that: Wife would be given exclusive possession of the marital residence; ordered that Husband deposit \$2,491 per month in a bill paying account to be used by Wife to pay: “the mortgage payment on the marital residence; food and household expenses for her and their son; the electric, gas, trash, telephone bills; car insurance on the 1992 Buick Regal and 1995 GMC Yukon; the parties’ four joint charge cards; uninsured medical expenses for Wife and son; all life insurance in effect; auto

expenses for Wife and Son; cell phones for Wife and Son; dental insurance for entire family; and any other necessary household expenses for Wife and Son[.]” Appellee’s Add. pp. 2-3. The provisional order also gave Husband limited permission to use the Regal and Yukon.

Wife filed an emergency petition for contempt citation on March 23, 2005. Following a hearing on April 6, 2005, the trial court issued a “No Contact” order against Husband and revoked Husband’s right to use the Regal and Yukon.

On April 14, 2005, Husband filed a petition for dissolution of marriage and request of preliminary hearing. An agreed preliminary entry was signed by the trial court on October 25, 2005, acknowledging Husband’s arrearage on his monthly payment under the provisional order, and maintaining the no contact and restraining orders.

On May 11, 2006, Husband filed a petition for modification of preliminary order and petition for contempt, alleging that Wife had failed to provide proof of payment of bills and that Son would no longer be eligible for child support effective July 2006. No hearing was held on this petition for modification until the final hearing four months later.

While the case was pending, Husband earned \$1,138 per week at his first job and an additional \$12.87 per hour through a second part-time job. The hours at his second job changed weekly. Wife earns \$400 per week. As of August 29, 2007, Husband had paid \$81,977.94 to support Wife and Son.

On September 12, 2007, a final hearing was held and on November 30, 2007, the trial court issued an order of dissolution that stated in pertinent part as follows:

8. While this case was pending, Wife has lived in the marital residence with the parties' son. [Son] attends Marian College and commutes from home.

* * *

10. While this case has been pending, Husband has worked full time at General Alarm earning \$1138 per week and part time at Federal Express earning \$12.87 per hour. Husband's hours at FedEx fluctuate week to week. []

* * *

11. In the March, 2005 Agreement, Husband agreed to pay \$2491 per month to Wife. Wife agreed to pay the mortgage payment on the residence; food and household expenses for her and [Son]; the electric bill; the gas bill; the trash bill; the telephone bill; car insurance for the 1992 Buick Regal and 1995 GMC Yukon; the parties' joint Capital One Master Card, the MBA Elite Charge Card, and the Direct Merchants charge card; uninsured medical expenses for Wife and [Son]; all life insurance in effect; auto expenses for Wife and [Son]; cell phones for Wife and [Son]; dental insurance on the entire family; and any other necessary household expenses for Wife and [Son].

* * *

14. Wife earns \$400 per week working at Williams Construction.

* * *

17. The parties purchased the marital residence from Wife's parents. Wife's parents reduced the purchase price \$20,000 as a gift to the parties.

* * *

19. The parties' mortgage payment is \$711.15 per month. The parties pay the real estate taxes separately. The interest rate on the mortgage is 6.25%. According to Exhibit 3, real estate taxes are \$179 per month.

20. Despite Husband's payments to Wife for almost three (3) years while this case has been pending, Wife's debt has increased since the date of separation. []

Wife cannot afford to refinance the mortgage.

23. [Son]'s cost to attend (excluding housing) Marian has been as follows: [\$44,629.00]

* * *

26. [Son] has not sent any of his grades to Husband. [Son] has had almost no contact with Husband while this case has been pending.

* * *

28. The fact is that as of August 29, 2007, Husband has paid \$81,977.94 to support Alex and his mother while this case has been pending.

* * *

32. The Court grants Husband's petition for modification of preliminary order filed May 11, 2006. Effective August 1, 2006, Husband shall have no obligation for child support or spousal maintenance. \$20,000 of \$32,375.66 paid by Husband since that date shall be considered as Husband's share of [Son]'s college expenses. \$12,375.66 of those payments shall be considered as an early distribution of property to Wife.
33. Husband shall have no further liability to assist in Alex's college expenses.

* * *

35. [] Further, Wife received during the marriage by way of gift or inheritance \$20,000.

Wife appeals.

Standard of Review

A strict standard of review is applied to a court's distribution of property upon dissolution. Wilson v. Wilson, 732 N.E.2d 841, 844 (Ind.Ct.App.2000), trans. denied. Decisions regarding the division of marital assets lie within the sound discretion of the trial court. In re Marriage of Davidson, 540 N.E.2d 641, 645 (Ind.Ct.App.1989). The party challenging the trial court's property division bears the burden of proof. Wilson, 732 N.E.2d at 844. The challenging party must overcome a strong presumption that the court complied with the statute and considered the evidence on each of the statutory factors. Id. "The presumption that a dissolution court correctly followed the law and made all the proper considerations in crafting its property distribution is one of the strongest presumptions applicable to our consideration on appeal." Id. We will reverse a property distribution only if there is no rational basis for the award. Id. We may not substitute our judgment for that of the dissolution court, even if the circumstances may have justified a different property distribution. Id.

I. Property Division

A. *Marital Home*

Wife argues that the trial court abused its discretion when it awarded the marital residence to Husband. Specifically, she claims the trial court had no reasonable basis for making the award, because of her family's former ownership of the residence, her exclusive possession of the residence, with her son, during the pendency of the separation and dissolution, and the current status of the mortgage and household bills. Wife also argues that the trial court did not give her an opportunity to attempt to refinance the residence.

The trial court awarded the marital residence to Husband because it did not believe that, even if Wife refinanced the residence, that Wife would be able to afford the mortgage payment and attendant costs of home ownership. At the time of the final order, Wife made \$400 per week and had minimum credit card payments totaling \$1,099 per month. The mortgage payment on the marital residence is \$711.15 per month and the real estate taxes on the residence are \$179 per month.

While Wife may be willing to attempt to refinance the residence, her income and non-mortgage financial obligations do not support her ability to do so. Additionally, Wife cannot take on the mortgage payment, household expenses, real estate taxes, and continue paying her credit card debt while she makes only \$400 per week. We conclude, as did the trial court, "Wife cannot afford to refinance the mortgage." Appellant's App. p. 60. The trial court did not abuse its discretion in awarding the marital residence to Husband.

B. *GMC Yukon*

Wife argues that the trial court abused its discretion when it awarded the GMC Yukon to Husband. Wife states that the vehicles awarded to her were impractical for her full-time use. Husband testified that the GMC Yukon drove better in the winter than did his 1995 Black Z28 and that he needed the Yukon to commute to and from one of his jobs. This is a rational basis for awarding the Yukon to the Husband, especially when the trial court awarded three cars to Wife. The trial court did not abuse its discretion in awarding the GMC Yukon to Husband.

C. *Provisional Order Payments*

Wife argues the trial court erred when it designated \$12,375.66 that had been received by Wife from Husband for payment of expenses as an early property distribution and that the trial court did not provide a rational basis for the \$20,000 that the trial court designated as Husband's portion of Son's college expenses. However, it appears that the real issue is a result of the lack of clarity in the provisional order as it relates to the amount paid by Husband to Wife for bills and the like.

In the provisional order dated March 19, 2005, the trial court ordered Husband to pay \$2,491 per month into Wife's bill-paying account but the trial court failed to specifically set forth the character and nature of these payments, i.e. how much of the payment is for the mortgage, child support, utilities, etc. Twenty-nine months later, as of August 29, 2007, Husband had paid \$81,977.94 to support Wife and Son.

In its final order, the trial court granted Husband's petition for modification of preliminary order and determined that because Son turned twenty-one in July of 2006, he

would no longer be eligible for child support. While no specific amount of child support has ever been determined by the trial court, the trial court apparently decided that all payments made after Son reached twenty-one did not include child support. Additionally, the trial court determined that, effective August 1, 2006, Husband would no longer be obliged to pay spousal maintenance.

Pursuant to Indiana Code section 31-15-4-13, “the issuance of the provisional order is without prejudice to the rights of the parties or the child as adjudicated at the final hearing in the proceeding.” While the trial court’s provisional order is not binding at the time of the final order, the trial court may take into account the amounts paid by one spouse to another when dividing the marital property. Under Herron v. Herron, 457 N.E.2d 564 (Ind. Ct. App. 1983), it is not improper or an abuse of discretion to consider temporary maintenance paid by one spouse to another in dividing marital property. The trial court apparently attempted to do so, in part.

However, the trial court designated that payments in the amount of \$12,375.66 made after August 1, 2006 would be considered early property disbursements and that the balance of payments made after August 1, 2006 in the amount of \$20,000 would be considered Husband’s portion of Son’s college expenses. This was an abuse of discretion. While part of this amount may be considered temporary maintenance, the entirety cannot be considered as such. For example, since part of this amount was allocated to payment of the marital residence mortgage that was ultimately awarded to Husband, Husband would be receiving both the benefit of the mortgage payments and the payments themselves. Additionally, the trial court erred in ordering that any part of the

provisional order payments should be considered Husband's portion of Son's college expenses. The provisional order does not provide for any payments for college expenses while it does provide for the support of Son through payments to Wife for housing and other household expenses.

We conclude that the trial court failed to provide a rational basis for its application of Husband's provisional order payments. The trial court did not set forth the character and nature of the amount Husband was ordered to pay under the provisional order. To the extent that the provisional order payments also benefited Husband, that amount may not be used in determining temporary maintenance. We remand this issue to the trial court for proper allocation and attribution of the Husband's provisional order payments.

D. *Gift/ Inheritance*

Wife argues that the trial court abused its discretion when it determined that Wife received \$20,000 by way of gift or inheritance during the marriage. The trial court failed to definitively state what constituted the \$20,000. The trial court established that Wife received an inheritance of \$6,000 from her father and an inheritance of \$4,000 from an aunt. Additionally, the trial court determined that Wife's parents reduced the purchase price of the marital residence by \$20,000 as a gift to both parties.

At trial, Wife offered the settlement statement for the marital residence. Vol. 2 Ex. 30. The statement states that the total paid by the borrower was \$104,456. The gross amount due to the seller was reduced by \$20,000, which is termed "gift equity." *Id.* We assume that the trial court credited the \$6,000 and \$4,000 inheritances to Wife and split the "gift equity" between Husband and Wife. If added together, the total is \$20,000.

However, the trial court's dissolution order does not explain the \$20,000 attributed to Wife.

At most, the evidence would support a finding that Wife received \$10,000 in inheritance from her father and aunt. Additionally, since Husband has received the marital residence and received all of the equity in the residence, Wife should not have part of the \$20,000 equity attributed to her for purposes of the property division. We remand this issue to the trial court for a more specific explanation of the \$20,000 attributed to Wife.

II. College Expenses

A. Parental Repudiation

Wife argues that the trial court abused its discretion when it determined that Son repudiated his relationship with Father and concluded that Father would have no further obligation to assist Son with college expenses. A parent has no absolute duty to provide a college education for his or her children. Snow v. Rincker, 823 N.E.2d 1234, 1237 (Ind. Ct. App. 2005), trans. denied. However, a court may order a parent to pay all or a part of the child's college expenses. Id. Such payments are reviewed for an abuse of discretion.

In some circumstances, an adult child's actions will act as a repudiation of the parental relationship and release that parent from his or her obligation to pay college expenses. Norris v. Pethe, 833 N.E.2d 1024, 1033 (Ind. Ct. App. 2005). Parental repudiation is defined as "a complete refusal to participate in a relationship with his or her parent." Id.

The evidence at trial that supports a repudiation is that Son failed to send to or communicate to Husband his grades while in college and that he had minimal contact with Husband during the pendency of the case. However, much other evidence does not support a repudiation of the relationship. Son encountered Father a number of times at the Indianapolis Race Park and received cards at Christmas and for his birthday. Tr. pp. 42, 44. Son testified that he attempted to call Father on numerous occasions but had to leave voicemails instead of speaking with Father. Tr. p. 44. Also, he testified that he still loved his father and had a relationship with him. Tr. p. 26.

While the relationship was not a close one, Son did not completely refuse to participate in a relationship with Father. In McKay v. McKay, the son considered his mother and stepfather his parents who he consulted regarding college-related decisions. Father sought a relationship and even asked for court intervention but the son testified that he had no interest in reestablishing the relationship and would not change his mind. 644 N.E. 2d 164, 168 (Ind. Ct. App. 1994). In Norris v. Pethe, the daughter refused to accept cards and flowers sent by her father for her birthday and she stated that she did not know if she would go to his funeral. 833 N.E.2d at 1033.

The relationship at issue in this case bears no resemblance to the relationships in cases in which repudiation was found. The trial court abused its discretion when it determined that Son had repudiated his relationship with his father such that Father would not be obligated to pay for college-related expenses.

Conclusion

The trial court did not abuse its discretion when it awarded the marital residence and the GMC Yukon to Husband. However, we remand to the trial court for a more detailed determination of the nature and character of the \$20,000 gift/inheritance attributed to Wife and the nature and character of the \$2,491 per month paid by Husband under the provisional order. This determination should include amounts attributable to child support and college expenses for Son and how much of the amounts paid are attributable to items that benefited both Husband and Wife, such as the mortgage payment. Further, we reverse the trial court's determination that son repudiated Father and that the trial court recalculate the property division after making the corrections called in this opinion.

Affirmed in part, reversed in part, and remanded with instructions.

BROWN, J., concurs.

BAKER, C.J., concurs in part, concurs in result in part and dissents in part.

IN THE
COURT OF APPEALS OF INDIANA

ALICIA KAY DOTSON,)	
)	
Appellant-Respondent,)	
)	
vs.)	No. 32A05-0802-CV-43
)	
STEPHEN M. DOTSON,)	
)	
Appellee-Petitioner.)	

BAKER, Chief Judge, concurring in part, concurring in result in part, and dissenting in part.

I concur in the result reached by the majority on the issue of the provisional order payments. Specifically, I agree that this issue should be remanded so that the trial court can clarify the way in which it arrived at its result. I write separately, however, to emphasize my belief that the trial court could still arrive at the same result—in other words, designating \$12,375.66 as an early property distribution and \$20,000 as Husband’s portion of Son’s college expenses—so long as it is able to support that result with calculations from the record.¹

¹ The majority notes that it is inappropriate to include Son’s college expenses as part of the provisional order payments. If the trial court concluded that Husband, in fact, owed \$20,000 for Son’s college expenses, it could solve this problem by finding that Husband had overpaid pursuant to the provisional

Furthermore, I respectfully dissent from the result reached by the majority on the issue of parental repudiation. In focusing on the evidence that does not support repudiation and ignoring the evidence that does support repudiation, I believe that the majority is impermissibly reweighing the evidence and assessing witness credibility. Inasmuch as there is evidence supporting the trial court's factual determination that Son repudiated the parental relationship, I do not believe that we can say that the trial court abused its discretion in that regard. Thus, I would affirm the trial court on this basis. In all other respects, I fully concur with the majority.

order by \$20,000, crediting Husband for that amount, and then applying that credit to his debt for the college expenses. The same result is reached but the proverbial "I's" are dotted and the "T's" are crossed.